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Supreme Court of the United States

OCTOBER TERM, 1968

NO. 414

THOMAS ROGERS LICHTEN, WILLIAM BOYD OLIVER, III, WILLIAM CODY WILSON, BILLY CHARLES MALONE, FRANK PINKERTON, WALLACE B. POTEAT, ROBERT V. STONE, VERNICE WAYNE OAKES, HARRY HALL WOMACK, III, ANTHONY C. KNEUPPER JR., THOMAS ALFRED HIPP, ARTHUR R. YARBROUGH, GILBERT CAMPOS, VAN RICHARD VIEBIG, JR., ANYA ALLISTER, MARGARET T. POTEAT, ANNE KEITH FINLAYSON, JOE TERRY HAWTHORN, PAULA B. HAWTHORN, JULIE C. CADENHEAD, LYNDA N. SHAFFER, and MARGUERITE F. CORLEY,

Appellants,

against

THE STATE OF TEXAS,

Appellee.

On Appeal From the Court of Criminal Appeals of the State of Texas

JURISDICTIONAL STATEMENT

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INDEX

	Page
A. The Opinion Below	1
B. Statement Of The Grounds On Which The Jurisdiction Of This Court Is Invoked	2
C. Questions Presented By The Appeal	3
1. Whether the cited state statutes conflict with the right of peaceful assembly guaranteed by the First and Fourteenth Amendments to the Constitution of the United States or are invalid as an overly broad regulation thereof.	
2. Whether the cited state statutes are invalid for vagueness by failing to give fair notice of and failing to define the boundary between permissible and impermissible conduct in a peaceful assembly, so as to unlawfully becloud the same, contrary to the First and Fourteenth Amendments to the Constitution of the United States.	
3. Whether the court below erred when it excluded evidence that a restaurant involved in this case, a "public accommodation" under the Civil Rights Act of 1964, had caused Negroes to be arrested or intimidated for seeking service therein. Appellants claim the exclusion impaired their proof of a lawful purpose to peacefully persuade the restaurant owner to abide by the said federal act.	
D. Concise Statement Of The Case Containing The Facts Material To The Questions Presented	4, 8
E. The Question Whether Articles 439 and 449 Of The Texas Penal Code Are In Fatal Conflict With The Right Of Peaceable Assembly As Protected By The First Amendment Is A Substantial And Serious Question In Several Respects	8, 14

	Page
Conclusion	14
APPENDIX—Opinion Of The Court Of Criminal Appeals Of The State Of Texas	15, 23
Judgment Appealed From	24, 25

TABLE OF CASES

Apthekar v. Secretary of State, 378 U.S. 500 (1964)	11
Ashton v. Kentucky, 384 U.S. 195 (1966)	2, 10
Baggett v. Bullitt, 377 U.S. 360 (1964)	11
Bridges v. California, 314 U.S. 252 (1942)	9
Briscoe v. State, 341 S.W.2d 432	4
Cantwell v. Connecticut, 310 U.S. 296 (1940)	2, 9, 11
Cole v. Arkansas, 388 U.S. 345 (1949)	20
Cox v. Louisiana, 379 U.S. 539 (1965)	2, 10
Edwards v. South Carolina, 370 U.S. 229 (1963)	2, 10
Herndon v. Lowry, 301 U.S. 242 (1934)	2
Keyishian v. Board of Regents	10
Lanzetta v. New Jersey, 206 U.S. 451 (1939)	2, 10
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	2, 10
Shelton v. Tucker, 364 U.S. 479 (1960)	11
Sherbert v. Verner, 374 U.S. 398 (1963)	11
Smith v. California, 361 U.S. 147 (1959)	11
Speiser v. Randal, 357 U.S. 513 (1958)	11
Whitehill v. Elkins, 88 S.Ct. 184 (1967)	10
Winters v. New York, 332 U.S. 507 (1948)	11

CONSTITUTIONAL PROVISIONS

Constitution of the United States:	
First Amendment	3
Fourteenth Amendment	3
Texas Statutes:	
Articles 439 and 449, Texas Penal Code	2, 3
United States Code:	
28 U.S.C. §1257 Par. (2)	2
42 U.S.C. §2000a	7

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JURISDICTIONAL STATEMENT

A. *The Opinion Below*

The opinion of the Texas Court of Criminal Appeals is not yet reported. It is reproduced as the Appendix hereto, pages 15-23, infra.

B. *Statement Of The Grounds On Which The Jurisdiction Of This Court Is Invoked*

1. This is an appeal by 22 defendants from final conviction for the offense of Unlawful Assembly, as defined in the Penal Code of the State of Texas in Articles 439 and 449.

2. Judgment of affirmance of conviction was rendered by the Court of Criminal Appeals on March 6, 1968. Motion For Rehearing was overruled on May 22, 1968. Notice Of Appeal was filed in the United States Supreme Court and in the Texas Court of Criminal Appeals on August 14, 1968.

3. Jurisdiction of the appeal is conferred on this Court by Title 28 U.S.C. §1257, Par. (2).

4. Cases sustaining the jurisdiction of the Court are: *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963); *Lanzetta v. New Jersey,* 206 U.S. 451 (1939); *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Herndon v. Lowry,* 301 U.S. 242 (1934); *Ashton v. Kentucky,* 384 U.S. 195 (1966); *Cox v. Louisiana,* 379 U.S. 539 (1965); *Edwards v. South Carolina,* 370 U.S. 229 (1963).

5. The Texas Statutes validity of which is involved, Articles 439 and 449 of the Penal Code of the State of Texas, Vernon's Annotated Penal Code of Texas, Articles 439 and 449, are as follows:

> "Article 439. 'Unlawful assembly'
>
> "An 'unlawful assembly' is the meeting of three or more persons with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof."

"Article 449. 'To prevent any person from pursuing his labor'

"If the purpose of the unlawful assembly be to prevent any person from pursuing any labor, occupation or employment, or to intimidate any person from following his daily avocation, or to interfere in any manner with the labor or employment of another, the punishment shall be by fine not exceeding five hundred dollars."

C. *Questions Presented By The Appeal*

1. Whether the cited state statutes conflict with the right of peaceful assembly guaranteed by the First and Fourteenth Amendments to the Constitution of the United States or are invalid as an overly broad regulation thereof.

2. Whether the cited state statutes are invalid for vagueness by failing to give fair notice of and failing to define the boundary between permissible and impermissible conduct in a peaceful assembly, so as to unlawfully becloud the same, contrary to the First and Fourteenth Amendments to the Constitution of the United States.

3. Whether the court below erred when it excluded evidence that a restaurant involved in this case, a "public accommodation" under the Civil Rights Act of 1964, had caused Negroes to be arrested or intimidated for seeking service therein. Appellants claim the exclusion impaired their proof of a lawful purpose to peacefully persuade the restaurant owner to abide by the said federal act.

D. *Concise Statement Of The Case Containing The Facts Material To The Questions Presented*

Article 439 of the Texas Unlawful Assembly Statute prohibits the meeting of three or more persons with intent to aid each other "by violence *or in any other manner*" to do certain things. The Texas Court of Criminal Appeals has held that a misdemeanor Information under this statute may not allege in the disjunctive an intent to aid "by violence *or* in some other manner . . .," but must allege one or the other. *Briscoe v. State,* 341 S.W.2d 432. The Texas Court has never narrowed or specified the meaning of "in any other manner."

Further, the Texas statute describes the prohibited object thus: ". . . either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof."

Literally, therefore, the statute prohibits the meeting of three or more persons with intent to aid each other "in any manner" illegally to deprive any person of any right or to disturb him in the enjoyment thereof."

Article 439, above analyzed, may be violated standing alone. However, if certain special purposes of the unlawful assembly exist, the penalty is enhanced. Article 449 provides that if the purpose of the unlawful assembly be to prevent any person from pursuing any labor, occupation or employment, or to intimidate any person from following his daily avocation, or to interfere in any manner with the labor or employment of another, the punishment shall be by fine up to $500.00.

Accordingly, Appellants were charged in the language of both statutes. The charge was that they did unlawfully meet together with the intent and purpose to aid

each other by sitting in the restaurant to prevent and deprive the owner of his right to pursue his occupation, employment and labor, and to disturb him in the enjoyment of his right to so operate his restaurant, the purpose of said unlawful assembly being to prevent the owner from pursuing his occupation, to intimidate him therefrom, and to interfere with his occupation, employment and labor. The exact language of the Information is set out in the Opinion of the Court of Criminal Appeals in the Appendix, infra, pages 16-17.

Appellants exceptions were duly presented in the trial court *in limine* challenging both the statutes and the Information because of their conflict with the First and Fourteenth Amendments to the Constitution of the United States, their overbroad regulation of the right of peaceful assembly, and their vagueness by failing to give fair notice of prohibited conduct and failing to define the boundary between permissible and impermissible conduct in a peaceful assembly. These motions were overruled. On appeal the constitutional issues thus posed were fully considered by the Court of Criminal Appeals. The holding of the Court of Criminal Appeals is best expressed in its own words, as follows:

> "In their exceptions to the information, appellants also challenged the constitutionality of Arts. 439 and 449, supra, on the ground that the two statutes violate the First and Fourteenth Amendments to the Constitution of the United States, which guarantee to all persons due process of law and freedom of speech, assembly, and the right of peaceful petition for the redress of grievances. By further exceptions, appellants challenged the constitutionality of the two statutes on the ground that they were vague and indefinite as to the acts prohibited. These exceptions

were by the court overruled—which action is the basis of appellants' points of error Nos. III and IV.

"Appellants, in their brief, concede that a state may, by statute, make it unlawful for a person to prevent any person from engaging in his lawful vocation (Art. 1621b, P. C., as amended) or to produce injury or damage to the property, person, or life of another person (Art. 466a, P. C., incitement to riot), but insist that the two statutes in question are void for vagueness. Specifically, appellants point to the language, found in Art 439, supra, 'in any other manner,' 'to commit an offense,' and 'to disturb him [any person] in the enjoyment thereof,' as making the statute vague and indefinite.

"Numerous decisions by the Supreme Court of the United States holding statutes unconstitutional under the void-for-vagueness doctrine are cited by appellants in their brief:

"In Wright v. Georgia, 373 U.S. 284, 10 L.Ed.2d 349, 83 S.Ct. 1240, the state's (Georgia's) breach-of-the-peace statute was struck down by the Supreme Court of the United States because it was construed as punishing conduct which could not constitutionally be punished. The decision involved the civil and constitutional rights of Negroes to be in a public park and is not deemed controlling here.

"Cantwell v. Connecticut, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900, involved a conviction for the common law crime of inciting a breach of the peace of general and undefined nature, and Ashton v. Kentucky, 384 U.S. 195, 16 L.Ed.2d 469, 86 S.Ct. 1407, was a conviction for the common law offense of criminal libel based upon a concept of the most general and undefined nature. Edwards v. South Carolina, 372 U.S. 229, 9 L.Ed.2d 697, 83 S. Ct. 680, and Cox v. Louisiana, 379 U.S. 536, 13 L.Ed. 2d 471, 85 S. Ct. 453, were convictions for breach

of the peace where the offense was imprecisely defined. In Hernden v. Lowry, 301 U.S. 242, 81 L.Ed. 1066, 57 S. Ct. 732, a Georgia insurrection statute which made no reference to force or violence except by the phrase: 'combined resistance to the lawful authority of the state,' was held invalid because of vagueness.

"We do not deem these cases as applicable to the statutes here involved—which statutes, in our opinion, are neither vague nor speculative as to their meaning.

"As written, Arts. 439 and 449, supra, give fair notice to a person as to the acts and conduct constituting the offense of unlawful assembly. Nor do we agree that Arts. 439 and 449, supra, are invalid as limiting persons' First-Amendment freedoms, as denounced in N.A.A.C.P. v. Button, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328, by the Supreme Court of the United States in a civil rights case."

The context in which the statute was invoked was a peaceful sit-in on July 25, 1965, at a public accommodation, the Cafe Raven at Huntsville, Texas. By the undisputed testimony this restaurant served, and offered to serve, interstate travelers by selling them food for consumption on the premises, the cafe being located only one block from two interstate highways, namely, U. S. 75 going north to the States beyond Texas and U. S. 190 going east into Louisiana. The restaurant advertised itself by signs on these highways (R. 11-12). 42 U.S.C.A. §2000a. Because the restaurant was still segregated, Appellants, all white citizens, peacefully demonstrated by entering the cafe as customers then remaining therein until the owner agreed to "integrate". The owner replied that he had integrated the cafe the night before.

Attempting to come to grips with the veracity problem of whether the cafe was or was not integrated at the time of the alleged offense and to develop and prove the lawful purpose of Appellants to accomplish compliance with the federal statute rather than some unlawful purpose, Appellants made an offer of proof to show the segregation policies of the restaurant during the preceding week and to prove that Negroes were arrested for attempting to be served there. The evidence was excluded by the trial court with the statement, "It is integrated, so I sustain the objection." (R. 17). Ruling on this point, the Court of Criminal Appeals said the trial court did not err in refusing to permit Appellants to offer the evidence in question. It assumed the disputed fact by holding that the owner had integrated the cafe and had so notified the public before Appellants entered the cafe and conducted their sit-in. The Court said:

> "Appellants were so advised but continued to sit in the cafe, with a demand that the owner notify a certain organization before they would agree to leave." Appendix, infra, p. 23.

E. *The Question Whether Articles 439 And 449 Of The Texas Penal Code Are In Fatal Conflict With The Right Of Peaceable Assembly As Protected By The First Amendment Is A Substantial And Serious Question In Several Respects.*

The ruling of the court below expressly considered and rejected the relevance of this Court's First Amendment cases of both overbreadth and vagueness. It intentionally retained as prosecutorial implements the language "in any other manner," "any right," "disturb in the enjoyment thereof," and "interfere in any manner" as a part of the State's arsenal for regulation of assembly.

The treatment of the subject in the opinion below is little more than a refusal to give effect to First Amendment principles promulgated by this Court.

(a) ". . .[N]o purpose in ratifying the Bill Of Rights was clearer than that of securing for the people of the United States much greater freedom of . . . assembly . . . than the people of Great Britain had ever enjoyed. It cannot be denied . . . that the . . . restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing." *Bridges v. California,* 314 U.S. 252 (1942). The Texas statute intentionally governs, indeed straddles, "assembly," an area thought at the time of its enactment in the last century to be subject to routine regulation as at common law. So the statute is not drawn "with narrow specificity," i.e., "narrowly drawn to prevent the supposed evil." *Cantwell v. Connecticut,* 310 U.S. 296 (1940). It is a dragnet to provide prosecutorial leeway to reach any imaginable situation when desirable.

(b) The Texas Court of Criminal Appeals has given no narrowing construction to limit the dragnet sweep of the statute. To the contrary, the phrase "any other means" is the deliberately retained sweep of regulation of assembly in Texas. In this case the Texas Court was content to avoid this Court's First Amendment cases with the simple statement that they are not applicable to the Texas statutes which "are neither vague nor speculative as to their meaning." Further: "Nor do we agree that Arts. 439 and 449, supra, are invalid as limiting persons' First-Amendment freedoms, as denounced in N.A.A.C.P. v. Button, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328, by the Supreme Court of the United States in a civil rights case." Appendix, infra, p. 20.

(c) All the considerations pertaining to associational freedoms discussed by this Court in *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), apply to the Texas statute. *First*, to prohibit an intent "by violence or in any other manner to commit an offense, illegally to deprive any person of any right, or to disturb him in the enjoyment thereof," is literally incomprehensible as a matter of due process. Every manner of doing things is covered and every right —state, federal, statutory or common law—is incorporated by reference both as to deprival and disturbance. The nexus between intent and impact is undefined. No one can know what the law expects of him and thus, fair notice is not given. *Lanzetta v. New Jersey*, 206 U.S. 451 (1939). No understandable connection between the manner of doing things and their adverse effect upon the enjoyment of unspecified rights exists. Therefore, judge and jury must create their own standards in each case. *Herndon v. Lowry*, 301 U.S. 242 (1934).

By incorporating "any right" of "any person" the statute incorporates by reference as a standard for criminal conduct all kinds of unknown and unpredictable common law and statutory rules deriving from all levels of government. *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Whitehill v. Elkins*, 88 S.Ct. 184 (1967). By couching the offense in terms of "disturbance of the enjoyment" of any right by any person, the statute is devoid of an ascertainable standard of guilt, since it refers to the boiling point of other persons. *Edwards v. South Carolina*, 370 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 539 (1965).

Second, the Texas statute, lacking as it does narrow specificity to regulate the area of group activity, leaves no breathing space necessary to the survival of First-

Amendment freedoms. *Cantwell v. Connecticut,* 310 U.S. 296, 311 (1940). This Court cannot presume that the statute curtails protected activity as little as possible. *Smith v. California,* 361 U.S. 147 (1959); *Winters v. New York,* 333 U.S. 507 (1948). The Court must consider the fact that this statute has possible application to every assembly which is critical of or jealous of, or opposed to, the lawful rights enjoyed by other people. Obviously, legitimate governmental purpose can be accomplished with much less drastic means with many alternative forms of regulation available to combat abuses without so much infringement upon First Amendment rights. *Shelton v. Tucker,* 364 U.S. 479 (1960); *Apthekar v. Secretary of State,* 378 U.S. 500 (1964); *Sherbert v. Verner,* 374 U.S. 398 (1963). A statute so broad and menacing as this one will naturally drive citizens to restrict their actions so as to provide leeway between their conduct and possible criminal applications to peaceful assembly conduct. *Baggett v. Bullitt,* 377 U.S. 360 (1964); *Speiser v. Randal,* 357 U.S. 513 (1958).

Third, the Texas statute is very bad law because it lends itself to selective enforcement under an umbrella of concealment of the real prosecutorial motives and the true findings of court and jury. As to the first point, we may pass over the prosecution's decision in this case to ignore the deprival of the rights of Negroes to service in a public accommodation while electing to prosecute those who support the Negroes. But, we cannot ignore the fact that in practically every facet of life people assemble and plan action or goals which may be thought by prosecuting officials to illegally deprive others' rights or to disturb others in the enjoyment of their rights. Indeed, in this era of American history, such assemblies are common

rather than exceptional. In a metropolitan city a group of irate housewives may picket a garbage disposal unit in an effort to rid their neighborhood of its noxious odors. Farm workers may gather together to embarrass others into recognition of a union, raising of wages, or to support of a minimum wage law. Negroes may gather to advertise or boycott business establishments on account of their employment policies. A Chamber of Commerce or a Restaurant Association may gather together to jointly finance the defeat of a union, the closing of unsanitary competitors, or the public promotion of minimum standards of public service, to the disturbance and detriment of some businesses. The Texas Unlawful Assembly Statute can be applied to any of these supposed assemblages.

On the second phase it is impossible to divine with certainty what right was the subject of protection by this prosecution and exactly what "purpose" Appellants intended which caused their conviction. Neither the statute, the Information, the evidence, the general finding of guilty, nor the Opinion of the Court of Criminal Appeals distinguishes between the "right" to operate a restaurant and the right to operate the restaurant as a segregated facility. Nor is there a distinction discernible of a purpose of the Appellants to interfere with the restaurant as contrasted with a purpose to cause integration of the restaurant in compliance with federal law. So far as this record shows, from the statute through the Court of Criminal Appeals, these Appellants may have been convicted because they intended the purpose of causing integration of the restaurant and intended to disturb its owner in the enjoyment of his right to operate the restaurant as a segregated facility. On page 1 of the State's brief in the Court of Criminal Appeals in the State's summary of the case the

statement is made that "this group of white people came from various sections of the state and from other states, assembled in Huntsville . . .," invaded the cafe, and remained there "unless he agreed to defendants' demands to operate his business according to the way the defendants believed it should be operated and the way defendants wished it to be operated." (R.).

This double talk fits in with the refusal of the prosecution to concede at the trial that the cafe was a covered public accommodation under duty not to discriminate against persons on account of race. (R.).

The exclusion of the Appellants' proffered evidence concerning the segregation policies of the cafe and the arrest of Negroes seeking to overcome the barriers is closely related to the constitutional question here presented. At the very least the evidence is highly material to Appellants' purpose. If Appellants believed upon reasonable basis that the cafe was operated as a segregated facility this fact would bear upon the traditional defense of mistake of fact. The exclusion of the evidence can only be justified on the basis that it was irrelevant whether the cafe was or was not a segregated facility if Appellants intended to disturb the owner in the enjoyment of his right to operate it. On this analysis, Appellants may have well been convicted for entertaining a purpose to induce compliance with an overriding federal policy by disturbing the owner regardless of whether the restaurant was illegally operated. Whether this is a permissible aim of an unlawful assembly presents other and serious constitutional questions. The point here is that a statute which forbids every disturbance in the enjoyment of a right makes it impossible to determine just what proprietary

protective policy the state has adopted and the prosecution seeks to vindicate. The same is true of the language in Article 449 which enhances the penalty if the "purpose of the unlawful assembly" is to "interfere in any manner with the labor or employment of another."

In *Cole v. Arkansas,* 338 U.S. 345 (1949), this Court upheld the constitutionality of a statute which prohibited two or more to assemble and by force and violence prevent or attempt to prevent another from engaging in a lawful vocation. The Court was at pains to be sure that the Arkansas statute did not penalize participation in a peaceful assembly but only personal participation in an assembly to wreak violence. This case presents what this Court was careful to rule out in *Cole,* that is, coverage of all conceivable manner of conduct to disturb all conceivable kind of right.

CONCLUSION

Appellants respectfully request that the judgment of conviction be reversed.

Respectfully submitted,

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APPENDIX

No. 40,871

Thomas Rogers Lichten, et al,
Appellants

—v.— —Appeal from Walker County

The State of Texas,
Appellee

OPINION

The appellants, Thomas Rogers Lichten, William Boyd Oliver, III, William Cody Wilson, Billy Charles Malone, Frank Pinkerton, Wallace B. Poteat, Robert V. Stone, Vernice Wayne Oakes, Harry Hall Womack, III, Anthony C. Kneupper, Jr., Thomas Alfred Hipp, Arthur R. Yarbrough, Gilbert Campos, Van Richard Viebig, Jr., Anya Allister, Margaret T. Poteat, Anne Keith Finlayson, Joe Terry Hawthorn, Paula B. Hawthorn, Julie C. Cadenhead, Lynda N. Shaffer, and Marguerite F. Corley were jointly charged, by information, in the County Court of Walker County, with the offense of unlawful assembly.

Upon a trial before the court without a jury, on their pleas of not guilty, the appellants were convicted and each assessed punishment at a fine of $100, except the appellant William Boyd Oliver, III, whose punishment was assessed at a fine of $250.

The prosecution is under Arts. 439 and 449 of the Penal Code of this State, which provide:

"Article 439. 'Unlawful assembly'

"An 'unlawful assembly' is the meeting of three or more persons with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof."

"Article 449. 'To prevent any person from pursuing his labor'

"If the purpose of the unlawful assembly be to prevent any person from pursuing any labor, occupation or employment, or to intimidate any person from following his daily avocation, or to interfere in any manner with the labor or employment of another, the punishment shall be by fine not exceeding five hundred dollars."

The information, omitting its formal parts, charged that on or about the 25th day of July, 1965, in Walker County, Texas, the appellants

". . . did then and there unlawfully meet together with the intent and purpose to aid each other, and by so aiding each other did thereby occupy and sit in chairs placed at various tables and by sitting within the booths, and at the counters on the counter stools placed thereat within the Cafe Raven situated within said County and State, and thereby by intimidation with their bodies did block the use of said tables and the chairs placed thereat, and the booths and the tables placed there between, and the counters and counter stools placed thereat and thereby prevented members of the public and patrons of the said Cafe Raven to occupy and use the aforesaid tables and the chairs placed thereat, and the aforesaid booths and the tables there between, and the counters therein and the counter stools placed

thereat where food and drink were regularly there served to members of the public and patrons, and said Defendants did thereby deprive and prevent ABE DABAGHI, hereinafter styled Complainant, of his right to pursue his occupation, employment and labor as the then owner and operator of the said Cafe Raven, and to then and thereby disturb said complainant in his said right to so operate said Cafe Raven and the employment of his labor and industry in the furtherance thereof; that is, the said complainant was then and there lawfully pursuing and engaging in the occupation, employment and labor of operating and maintaining a cafe, and the purpose of the said unlawful assembly and the intent of said defendants, engaged thereby, was then and there to prevent and deprive the said complainant from pursuing said occupation, employment and labor and to intimidate him from following his avocation and to interfere with his occupation, employment and labor . . . ."

Appellants excepted to the substance of the information on the ground that "it does not appear from the face of the same that an offense against the law was committed . . ." and to the form of the information on the ground that "the offense attempted to be charged in the information is not set forth in plain and intelligible words."

Such exceptions to the information were by the court overruled, which action of the court constitutes the basis for appellants' grounds of error Nos. I and II.

As we understand appellants' contention, it is that the information failed to allege that appellants met with *the intent* to aid each other *by violence or some other means* to accomplish a prohibited objective.

A reading of the information shows it did allege that the appellants unlawfully met together with the intent and purpose to aid each other by sitting in the complainant's cafe to prevent and deprive him of the right to pursue his occupation, labor, and employment as owner of the Cafe Raven. Generally, the information follows the form found in Willson's Texas Criminal Forms, Seventh Edition, Sec. 509, at page 150.

Briscoe v. State, 341 S.W.2d 432, cited by appellants, is not here controlling, because in that case the defect in the information was the allegation, in the disjunctive, that the unlawful meeting was with the intent to aid each other "by violence *or* in some other manner . . . ."

There is no allegation in the instant information in the disjunctive.

Cole v. State, 194 S.W. 830, cited by appellants, is not here controlling, because in that case the information alleged neither the intent to aid each other by violence nor to aid each other in any other manner.

In the instant case, the allegations of the information as to the means are sufficient to aver that the appellants' intent to aid each other was *by sitting in the complainant's cafe,* as alleged in detail therein.

While the information is not approved as a model form, we find the allegations therein sufficient to charge an offense under Arts. 439 and 449, supra, and overrule appellants' first two grounds of error.

In their exceptions to the information, appellants also challenged the constitutionality of Arts. 439 and 449, supra, on the ground that the two statutes violate the First and Fourteenth Amendments to the Constitution of the United States, which guarantee to all persons due

process of law and freedom of speech, assembly, and the right of peaceful petition for the redress of grievances. By further exceptions, appellants challenged the constitutionality of the two statutes on the ground that they were vague and indefinite as to the acts prohibited. These exceptions were by the court overruled—which action is the basis of appellants' points of error Nos. III and IV.

Appellants, in their brief, concede that a state may, by statute, make it unlawful for a person to prevent any person from engaging in his lawful vocation (Art. 1621b, P.C., as amended) or to produce injury or damage to the property, person, or life of another person (Art. 466a, P.C., incitement to riot), but insist that the two statutes in question are void for vagueness. Specifically, appellants point to the language, found in Art. 439, supra, "in any other manner," "to commit an offense," and "to disturb him (any person) in the enjoyment thereof," as making the statute vague and indefinite.

Numerous decisions by the Supreme Court of the United States holding statutes unconstitutional under the void-for-vagueness doctrine are cited by appellants in their brief:

In Wright v. Georgia, 373 U.S. 284, 10 L.Ed.2d 349, 83 S. Ct. 1240, the state's (Georgia's) breach-of-the-peace statute was struck down by the Supreme Court of the United States because it was construed as punishing conduct which could not constitutionally be punished. The decision involved the civil and constitutional rights of Negroes to be in a public park and is not deemed controlling here.

Cantwell v. Connecticut, 310 U.S. 296, 84 L.Ed. 1213, 60 S. St. 900, involved a conviction for the common law

crime of inciting a breach of the peace of general and undefined nature, and Ashton v. Kentucky, 384 U.S. 195, 16 L.Ed.2d 469, 86 S. Ct. 1407, was a conviction for the common law offense of criminal libel based upon a concept of the most general and undefined nature. Edwards v. South Carolina, 372 U.S. 229, 9 L.Ed.2d 697, 83 S. Ct. 680, and Cox v. Louisiana, 379 U.S. 536, 13 L.Ed.2d 471, 85 S. Ct. 453, were convictions for breach of the peace where the offense was imprecisely defined. In Hernden v. Lowry, 301 U.S. 242, 81 L.Ed. 1066, 57 S. Ct. 732, a Georgia insurrection statute which made no reference to force or violence except by the phrase: "combined resistance to the lawful authority of the state," was held invalid because of vagueness.

We do not deem these cases as applicable to the statutes here involved—which statutes, in our opinion, are neither vague nor speculative as to their meaning.

As written, Arts. 439 and 449, supra, give fair notice to a person as to the acts and conduct constituting the offense of unlawful assembly. Nor do we agree that Arts. 439 and 449, supra, are invalid as limiting persons' First-Amendment freedoms, as denounced in N.A.A.C.P. v. Button, 371 U.S. 415, 9 L.Ed.2d 405, 83 S. Ct. 328, by the Supreme Court of the United States in a civil rights case.

In their last grounds of error Nos. V, VI, VII, and VIII, appellants question the sufficiency of the evidence to support their conviction, in view of the Civil Rights Act of 1964, pertaining to public accommodations: 42 U.S.C.A., and particularly to Secs. 2000a(a) and 2000a-1 and 2000a-2 thereof, which provide:

Sec. 2000a(a): "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

Sec. 2000a-1: "All persons shall be entitled to be free at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof."

Sec. 2000a-2: "No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 2000a or 2000a-1 of this title, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a-1 of this title, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a or 2000a-1 of this title."

A disposition of the grounds of error necessitates a brief statement of the facts:

The complainant, Abe Dabaghi, seventy-two years of age, operated in the city of Huntsville the Cafe Raven, which was open to and served the general public. On Sunday, July 25, 1965, twenty-six white persons, including the twenty-two appellants, came into the cafe shortly after four o'clock, p.m. Not all twenty-six entered at the

same time but came in at separate intervals and seated themselves so as to have—with possibly two exceptions—only one person sitting at a table or booth. Eventually, all tables and booths and every other stool at the counters were occupied by the group. Some of the group ordered coffee, some Coca Cola, and some merely wanted water. Later, around six o'clock, p.m., as customers entered the cafe and were waiting to be seated, the complainant asked one of the persons seated at a table to move and sit with another person sitting alone at another table. The person refused, saying he wanted to sit by himself. The complainant then asked the man seated with two ladies at another table, "what's going on," and he replied, ". . . we are going to sit down, we want you to integrate . . . ." When the complainant replied that he had already integrated and asked them several times to leave, they refused. The appellant Reverend Oliver then informed the complainant that the group was going to sit in the cafe until he integrated the place and hired Negro waitresses. The complainant again informed the group that he had integrated the cafe the night before and had served Negroes that Sunday morning. The group still refused to leave, and Reverend Oliver stated, "Well, you haven't officially notified HA-YOU that your cafe is integrated. If you will notify HA-YOU, we will leave." An effort was then made to give such notice to a Reverend Sampson, of HA-YOU, but to no avail. The record shows that appellants were then removed from the cafe, around seven o'clock, p.m., by duly elected officers, upon process legally issued. As a result of the sit-in by appellants, the complainant was unable to serve customers who came into his place of business.

It is first insisted that since the evidence showed that the cafe in question served interstate travelers and was

a place of public accommodation within the purview of the Civil Rights Act the appellants were not subject to prosecution for exercising their rights secured by the act and that their special plea, filed under Art. 27.02, C.C.P., setting forth facts why they should not be prosecuted, should have been sustained. It is further insisted that the evidence is insufficient to sustain the conviction because the proof shows that the appellants' only purpose in sitting in the cafe was to persuade the owner to comply with the federal statute prohibiting discrimination or segregation on the ground of race, color, religion, or national origin.

We find no merit in said contention, as the record shows that the complainant had integrated the cafe and so notified the public before appellants entered and conducted tneir sit-in on the day in question. Appellants were so advised but continued to sit in the cafe, with a demand that the owner notify a certain organization before they would agree to leave. Clearly, they were not asserting their civil rights or the rights of others in so conducting themselves.

In refusing to permit appellants to offer evidence of the segregation policies of the cafe prior to the time it was integrated on the night of July 24, the court did not err.

We find the evidence sufficient to sustain the appellants' conviction for the offense of "unlawful assembly" under Arts. 439 and 449 of the Texas Penal Code.

The Judgment is affirmed.

DICE, Judge

(Delivered March 6, 1968)

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
OF TEXAS, AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 40,871 styled:

ANYA ALLISTER, THOMAS ROGERS LICHTEN, ET AL, *Appellants*

vs.

STATE OF TEXAS, *Appellee*

judgment of the County Court of Walker County, Texas, was affirmed on March 6, 1968. Appellant's Motion for Rehearing was overruled, without written opinion, May 22, 1968, and on May 24, 1968 mandate was stayed for appeal to the Supreme Court of the United States.

THEREFORE, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on May 22, 1968, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and said judgment has now become final on the docket ofthis Court.

WITNESS my hand and Seal of said Court, at office, in Austin, Texas, this the 14th day of June, A.D., 1968.

GLENN HAYNES, *Clerk of the Court of Criminal Appeals of Texas*

A TRUE COPY:
Attest:
GLENN HAYNES, *Clerk*
Court of Criminal Appeals of Texas
[SEAL]

No. 8022-A

THE STATE OF TEXAS

vs.

THOMAS ROGERS LICHTEN, et al

IN THE COUNTY COURT OF WALKER COUNTY, TEXAS. March-April Term, 1967.

The above numbered and entitled cause, wherein the defendants, William Boyd Oliver, III, William Cody Wilson, Billy Charles Malone, Frank Pinkerton, Thomas Rogers Lichten, Wallace B. Poteat, Robert V. Stone, Vernice Wayne Oakes, Harry Hall Momack, III, Anthony C. Kneupper, Jr., Thomas Alfred Hipp, Arthur R. Yarbrough, Gilbert Campos, Van Richard Viebig, Jr., Anya Allister, Margaret T. Poteat, Anne Keith Finlayson, Joe Terry Hawthorn, Paula B. Hawthorn, Julie C. Cadenhead, Lynda N. Shaffer and Marguerite F. Corley, stand charged by Information for the offense of Unlawful Assembly, was on the 19th day of April, A.D., 1967, called for trial. The defendants William Boyd Oliver, III, William Cody Wilson and Billy Charles Malone appeared in person and by their attorneys, and the remaining defendants appeared by and through their attorneys of record, and all parties announced ready for trial.

The Defendants, in writing, waived a trial by jury, and submitted the decision of the cause to the Court.

Attorney for defendant, in open Court, waived the reading of the Information, charging the defendants with said offense, and to said charge and accusation, the defendants, by and through their attorney, in open Court, duly made and entered a plea of not guilty.

After preliminary pleas, motions and discussions had been duly offered and considered, all evidence was introduced and submitted.

Thereupon, the Court finds that the said defendants are guilty of the offense charged in said information.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court, that the defendants are guilty of said offense of Unlawful Assembly as charged in the foregoing Information, and said defendants shall be punished, as found and determined by the Court, as follows: William Boyd Oliver, III, by a fine of $250.00, William Cody Wilson by a fine of $100.00, Billy Charles Malone by a fine of $100.00, Frank Pinkerton by a fine of $100.00, Thomas Rogers Lichten by a fine of $100.00, Wallace B. Poteat by a fine of $100.00, Robert V. Stone by a fine of $100.00, Vernice Wayne Oakes by a fine of $100.00, Harry Hall Womack, III, by a fine of $100.00, Anthony C. Kneupper, Jr., by a fine of $100.00, Thomas Alfred Hipp by a fine of $100.00, Arthur B. Yarbrough by a fine of $100.00, Gilbert Campos by a fine of $100.00, Van Richard Viebig, Jr., by a fine of $100.00, Anya Allister by a fine of $100.00, Margaret T. Poteat by a fine of $100.00, Anne Keith Finlayson by a fine of $100.00, Joe Terry Hawthorn by a fine of $100.00, Paula B. Hawthorn by a fine of $100.00, Julie C. Cadenhead by a fine of $100.00, Lynda N. Shaffer by a fine of $100.00 and Marguerite F. Corley by a fine of $100.00, and that the State of Texas have and recover of and from the defendants all costs of Court, in this prosecution expended, for which execution may be issued; and that this judgment be enforced as directed by law.

AMOS R. GATES
County Judge,
Walker County, Texas

PREME COURT U. S.

Office-Supreme Court, U.S.
FILED
SEP 19 1968
JOHN F. DAVIS, CLERK

No. 414

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

THOMAS ROGERS LICHTEN, WILLIAM BOYD OLIVER, III, WILLIAM CODY WILSON, BILLY CHARLES MALONE, FRANK PINKERTON, WALLACE B. POTEAT, ROBERT V. STONE, VERNICE WAYNE OAKES, HARRY HALL WOMACK, III, ANTHONY C. KNEUPPER, JR., THOMAS ALFRED HIPP, ARTHUR R. YARBROUGH, GILBERT CAMPOS, VAN RICHARD VIEBIG, JR., ANYA ALLISTER, MARGARET T. POTEAT, ANNE KEITH FINLAYSON, JOE TERRY HAWTHORN, PAULA B. HAWTHORN, JULIE C. CADENHEAD, LYNDA N. SHAFFER, and MARGUERITE F. CORLEY,

Appellants

v.

THE STATE OF TEXAS,

Appellee

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

MOTION TO DISMISS OR AFFIRM

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
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INDEX

A. Citation To Opinion Below 1

B. Jurisdiction 2

C. Question Presented 2

1. Are the unlawful assembly statutes of Texas as promulgated and interpreted by the Courts constitutional; and alternatively, were Appellants deprived of any right guaranteed to them by the United States Constitution by the application of the unlawful assembly statutes to them in the performance of their activities as revealed by the facts of this case.

D. Constitutional Provisions And State Statutes Involved 2

E. Statement Of The Case 3

F. Argument 4

G. Conclusion 12

H. Proof Of Service 13

TABLE OF CASES

Adderley v. Florida, 385 U.S. 39 10

Blackwell v. State, 18 S.W. 676 7

Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952) 6

Briscoe v. State, 341 S.W.2d 432 (1961) 8

Cox v. Louisiana, 379 U.S. 559 ..... 8, 11

Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762 8

Follis v. State, 40 S.W. 277 7

Johnson v. State, 341 S.W.2d 434 (1961) 8

Jones v. State, 355 S.W.2d 727 (1962) 8

Jordan v. DeGeorge, 341 U.S. 223 (1951) 5

Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448 8

Luter v. State, 22 S.W. 140 7

Poulos v. State of New Hampshire, 345 U.S. 395, 73 S.Ct. 760 8

Roth v. United States, 354 U.S. 476, 491 (1957) 5

Seigman v. District of Columbia, D.C. Mun. App., 48 A2d 764, 765 (1946) 6

Tucker v. State, 341 S.W.2d 433 (1961) 8
United States v. Louis, 100 A.2d 40 (1953) 5
United States v. Ragen, 314 U.S. 513 (1942) 5

CONSTITUTIONAL PROVISIONS

Constitution of the United States:
First Amendment 2
Texas Statutes:
Articles 439 and 449, Texas Penal Code 2, 3, 7

No. --------

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

THOMAS ROGERS LICHTEN, WILLIAM BOYD OLIVER, III, WILLIAM CODY WILSON, BILLY CHARLES MALONE, FRANK PINKERTON, WALLACE B. POTEAT, ROBERT V. STONE, VERNICE WAYNE OAKES, HARRY HALL WOMACK, III, ANTHONY C. KNEUPPER, JR., THOMAS ALFRED HIPP, ARTHUR R. YARBROUGH, GILBERT CAMPOS, VAN RICHARD VIEBIG, JR., ANYA ALLISTER, MARGARET T. POTEAT, ANNE KEITH FINLAYSON, JOE TERRY HAWTHORN, PAULA B. HAWTHORN, JULIE C. CADENHEAD, LYNDA N. SHAFFER, and MARGUERITE F. CORLEY,

Appellants

v.

THE STATE OF TEXAS,

Appellee

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

MOTION TO DISMISS OR AFFIRM

Appellee, The State of Texas, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the above cause be dismissed on the ground that the appeal is not within the jurisdiction of this Court because it is not taken in conformity with the statutes and rules governing appeals to this Court and does not present a substantial federal question, or, in the alternative, Appellee moves that the judgment of the Court below be affirmed.

CITATION TO OPINION BELOW

The opinion below is adequately set forth in the jurisdictional Statement.

JURISDICTION

Appellee disputes the jurisdiction of the Court because the Texas statutes on unlawful assembly which are challenged by Appellant here are constitutional and hence no grounds for appeal to the Court exists.

QUESTION PRESENTED

Are the unlawful assembly statutes of Texas as promulgated and interpreted by the Courts constitutional; and alternatively, were Appellants deprived of any right guaranteed to them by the United States Constitution by the application of the unlawful assembly statutes to them in the performance of their activities as revealed by the facts of this case.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

The First Amendment to the Constitution of the United States, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Articles 439 and 449 of the Penal Code of the State of Texas provide:

"Article 439. 'Unlawful assembly'

"An 'unlawful assembly' is the meeting of three

or more persons with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof."

"Article 449. 'To prevent any person from pursuing his labor'

"If the purpose of the unlawful assembly be to prevent any person from pursuing any labor, occupation or employment, or to intimidate any person from following his daily avocation, or to interfere in any manner with the labor or employment of another, the punishment shall be by fine not exceeding five hundred dollars."

STATEMENT OF THE CASE

On July 25, 1965, seventy-two-year-old Abe Dabaghi, the complainant, owned and operated in the city of Huntsville, Walker County, the Cafe Raven, which was open to and served the general public. On that day, twenty-six white persons, none of which resided in Huntsville or Walker County, came into the cafe shortly after four o'clock, p.m. Not all twenty-six entered at the same time but came in at separate intervals and seated themselves so as to have only one person sitting at a table or booth. Eventually, all tables and booths and alternate stools at the counters were occupied by the group. Some of the group ordered coffee, some Coca-Cola, and some merely wanted water. None of the members of the group were ever refused service. It took approximately three hours for them to consume their beverages. Later, around six o'clock, p.m., as customers entered the cafe and were waiting to be seated, Mr. Dabaghi asked one of the persons seated at a table to move and sit with another person

sitting alone at another table. The person refused, saying he wanted to sit by himself. Mr. Dabaghi then asked a man seated with two ladies at another table, "what's going on," and he replied, ". . . we are going to sit down, we want you to integrate . . ." Mr. Dabaghi replied that he had already made a public announcement carried by all the news media that his cafe was integrated. After several more requests to leave, the group refused. The Appellant, The Most Reverend Oliver, then informed Mr. Dabaghi that the group was going to sit in the cafe until he integrated the place and hired negro waitresses. Mr. Dabaghi again informed them that he had already integrated the cafe the night before and had served Negroes that Sunday morning. They still refused to leave and Reverend Oliver stated, "Well, you haven't officially notified HA-YOU that your cafe is integrated. If you will notify HA-YOU we will leave." Pursuant to instruction an effort was then made to give such notice to another Reverend Sampson, of HA-YOU, but he could not be located. The arresting officers asked the group to leave before arresting them. As a result of the sit-in by Appellants, complaints were executed by Mr. Dabaghi and the group was arrested upon process legally issued.

ARGUMENT

Appellants contend, in substance, that their First Amendment right of freedom of assembly was unconstitutionally abridged by application of the Texas Unlawful Assembly statutes to their sit-in in the Cafe Raven.

Appellant urges that these state statutes are vague and indefinite as to the acts prohibited.

He who would controvert the constitutionality of a statute must bear the burden of overcoming the strong presumption of its constitutionality. *United States v. Louis,* 100 A.2d 40 (1953), 214 F.2d 853 (1954), Aff'd. 348 U.S. 419 (1955).

It is axiomatic that a statute is not unconstitutionally vague simply because it fails to state with particularity every possible kind of conduct which it prohibits. *Jordan v. DeGeorge,* 341 U.S. 223 (1951); *United States v. Ragen,* 314 U.S. 513 (1942). Indeed, the Constitution does not require impossible standards. That there may be ". . . marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . ." *Roth v. United States,* 354 U.S. 476, 491 (1957).

In *Roth,* supra, the Court held that a statute which makes punishable the mailing of material that is "Obscene, lewd, lascivious, or filthy" was not fatally void for vagueness. In discussing the contention that the words of the statute are not sufficiently precise, the Court, at pp. 491-492, said:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States v. Petrillo,* 332 U.S. 1, 7-8, These words, applied according to the proper standard for judging obscenity, already discussed,

> give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' * * * [Citations omitted.]

In short, nothing more than "reasonable certainty" in a criminal statute is required. Thus, in *Boyce Motor Lines v. United States,* 342 U.S. 337, 340 (1952), the Court said:

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. * * *" [Footnote omitted.]

So long as the statute provides "reasonably ascertainable standards of guilty," no more is required. In *Seigman v. District of Columbia,* D.C. Mun.App., 48 A.2d 764, 765 (1946), in construing a vagrancy statute, the Court stated in refusing to void a regulation because of claimed vagueness:

> "Generally, as a matter of fundamental justice, a statute defining a crime must prescribe reasonably ascertainable standards of guilt in order that a citizen may know in advance just what acts are

> required or forbidden. The standards need not be so precise as to be capable of reduction to an exact mathematical formula, or of mechanical application. * * *".

At no time has this Court suggested that the criminal law must graphically be plotted on pages of the statute books, for the words of a statute are, after all, but symbols. And, as this Court has observed, ". . . few words possess the precision of mathematical symbols, most symbols must deal with untold and ununforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, *no more than a reasonable degree of certainty can be demanded . . .*" *Boyce Motor Lines, Inc. v. United States,* supra.

The Texas Court of Criminal Appeals has given these Articles 439 and 449 very narrow interpretations and required that the indictments set out in detail the matter with which the persons are actually charged. For example, *Blackwell v. State,* 18 S.W. 676, the court said that if the indictment or information throughout did not show for what purpose the rioters assembled, the information was insufficient. In the case of *Follis v. State,* 40 S.W. 277, it was held that an indictment for unlawful assembly to prevent a party by violence from having a social gathering or dance at his house should allege that such party has a house and was giving or about to give a social gathering or dance. In *Luter v. State,* 22 S.W. 140, the Court held information was defective under Article 449 for failure to set forth the nature of the "lawful employment."

In *Briscoe v. State* (1961), 341 S.W.2d 432, the indictment was held defective because there was no notice as to whether the State would rely on intent by violence to disturb the victim and deprive him of his right to operate a lunch counter or would rely on proof on an intent to deprive him of such right by some means other than by the use of violence. The attention of the Court is also directed to *Tucker v. State* (1961), 341 S.W.2d 433, and *Johnson v. State* (1961), 341 S.W.2d 434. Likewise in *Jones v. State* (1962), 355 S.W.2d 727, the mere attempt to procure service at a railroad terminal without an act of violence or other violation of the law would not justify conviction.

We recognize that the right of lawful assembly is constitutionally protected. The Statute is not directed at a lawful assembly, but at the unlawful one which is not constitutionally protected. See *Cox v. Louisiana,* 379 U.S. 559. It is well settled that courts are inclined to adopt that reasonable interpretation of a statute which moves it furthest from possible constitutional infirmity, *Kovacs v. Cooper,* 336 U.S. 77, 69 S.Ct. 448, and *Cox v. New Hampshire,* 312 U.S. 569, 61 S.Ct. 762. It has likewise been held that even a lawful assembly is subject to state regulation, *Poulos v. State of New Hampshire,* 345 U.S. 395, 73 S.Ct. 760. In the latter case the Court stated at Page 405:

> "The principles of the First Amendment are not to be treated as premise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction . . . it has indicated approval of reasonable non-discriminatory regulation by governmental authority that preserved peace, order and tranquility without deprivation

> of First Amendment guarantees of free speech, press, and the exercise of religion. When considering specifically the regulation of the use of public parks, this court has taken the same position."

Appellant attacks the language "or by any other men." Such language is merely superfluous. The evil which is attacked by the statute is ". . . to aid each other . . . to deprive any person of any right or to disturb him in the enjoyment thereof."

To say that the Legislature must specify the many evils and corrupt practices which might constitute a deprivation of such a right would render a police regulation in connection therewith impossible, not pausing to consider the impropriety of expression which would also be necessary.

A reading of the information shows it did allege that the Appellants unlawfully met together with the intent and purpose to aid each other by sitting in the complainant's cafe to prevent and deprive him of the right to pursue his occupation, labor, and employment as owner of the Cafe Raven.

Contrary to Appellants' innuendoes in the third question presented, there were no Negroes in the sit-in group and no person was ever refused service. On the contrary, the evidence is clear that the complainant had integrated and had made a public announcement through the news media to that effect. The evidence showed he had served Negroes the previous day and on the day in question. Appellants were charged with a violation of the Texas Statute as a result of their refusal to depart from the premises of the Raven Cafe after being served and after being notified to depart therefrom by the owner and by the police officer. It

is important to note that this was not a protest against being refused service by a "public accommodation" under the Civil Rights Act of 1964. After having been served according to their wishes and allowed no less than three hours to consume their coffee, Coca-Cola, and water, they had no Constitutional right to be in the restaurant and their refusal to leave was a deliberate and calculated act by the entire group to prevent the complainant from pursuing his labor, occupation, and daily vocation. As indicated by Reverend Oliver, the sole purpose was to prevent service to others, in direct interference with Mr. Dabaghi's occupation and labor as a server of food.

Recently this Court upheld the application of a state trespass statute to protestants that refused to obey a sheriff's order to remove themselves from what amounted to the curtilage of a jailhouse. *Adderley v. Florida,* 385 U.S. 39.

In *Adderley* this Court stated:

> "Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute. . . . The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate. . . . Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitution-

al law was vigorously and forthrightfully rejected in two of the cases petitioners rely on, *Cox v. Louisiana,* supra, 379 U.S. at 554-555 and 563-564, 13 L ed 2d at 484 and 491, 492. We reject it again."

It certainly cannot be said that any person has squatters rights in any "public accommodations" under the guise of freedom of assembly. Nothing in the Constitution of the United States guarantees the right to an individual to use the property of another for unlawful purposes. There can not be any merit to Appellants' position that they had a constitutional right to stay in the restaurant and peacefully assembly. Such a position assumes that people have a constitutional right to do whatever they desire, whenever, however and wherever they please.

The statutes attacked herein are precisely and narrowly drawn regulatory statutes which provide that certain specific conduct be limited as proscribed. They are not so overbroad and vague by failing to define the boundary between permissible and impermissible conduct in a peaceful assembly.

The statutes are aimed at conduct of a limited kind; that is for persons who without lawful authority assemble to prevent any person from pursuing any labor, occupation or employment, or to intimidate any person from following his daily avocation.

Article 449 must be read in conjunction with Article 439 which defines "unlawful assembly." The prevention or interference with a person pursuing his labor by the assembly must be through violence, by a criminal act or in violation of an existing valid statute or court order (unlawfully). We submit that the Statutes in question are not unconstitutional on the grounds alleged.

Must this Court hear every case on the merits in which a defendant claims a statute of a state violates due process? If so, every time a state statute is enforced, the objection that it violates the Fourteenth Amendment of the Constitution of the United States would confer jurisdiction on this Court. The question in itself suggests the obvious negative response.

CONCLUSION

The Appellee respectfully submits that the Appellant presents no substantial question for review by this Court and that this Appeal should be dismissed or the judgment below should be affirmed.

Respectfully submitted,
CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant Attorney General
A. J. CARUBBI, JR.
Executive Assistant
HAWTHORNE PHILLIPS
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ALLO B. CROW, JR.

By_____
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Austin, Texas 78711

PROOF OF SERVICE

I, Hawthorne Phillips, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and do now enter my appearance in the Supreme Court of the United States in the above captioned cause, on behalf of the Appellee; I do further certify that a copy of the foregoing Motion to Dismiss or Affirm has been forwarded by United States Mail, First Class, Postage Prepaid, to Mr. Chris Dixie, 505 Scanlan Building, Houston, Texas 77002, Attorney for Appellant, this ------ day of September, 1968.

HAWTHORNE PHILLIPS
Assistant Attorney General

NO. 414

IN THE

Supreme Court of the United States

THOMAS ROGER LICHTEN, ET AL.

v.

STATE OF TEXAS

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

APPELLANTS' MOTION FOR REHEARING OF DISMISSAL OF APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

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NO. 414

IN THE

Supreme Court of the United States

THOMAS ROGER LICHTEN, ET AL.

v.

STATE OF TEXAS

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PETITION FOR REHEARING

Under Rule 58, all Appellants petition for rehearing of the dismissal of this appeal on October 28, 1968 for want of a substantial federal question, from which order Mr. Justice Harlan dissented.

On November 18, 1968, this Court noted probable jurisdiction in No. 492, *Brandenberg v. Ohio,* in which the Ohio criminal syndicalism statute is challenged on First Amendment grounds. This intervening event justifies, indeed compels, this request for rehearing because of the similarity of the two statutes.

The Ohio statute in No. 492 is:

Ohio Revised Code 2923.13. *Advocating criminal syndicalism.*

> No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; . . . or voluntarily assemble with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

The Ohio appellant was convicted in one count for advocating the necessity or propriety of crime, violence or unlawful methods of terrorism as a means of accomplishing political reform, and, in a second count for voluntarily assembling "with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism."

The Texas statute in this case is Article 439 of the Texas Penal Code, entitled *Unlawful Assembly.*

> "Unlawful assembly" is the meeting of three or more persons with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof.

Article 449 of the Texas Penal Code enhances the punishment if the purposes of unlawful assembly be to prevent any person from pursuing his occupation or avocation or to interfere in any manner with another's labor.

Both statutes are fatally broad. The Texas statute is worse than the Ohio statute because the latter is limited to the advocacy of crime, sabotage, violence or unlaw-

ful methods of terrorism while the Texas statute reaches assembly with an intent by any means, whether violent or not, to accomplish certain objectives, whether criminal or not, and whether otherwise illegal or not.

The different disposition of the two cases appears to us to concern primarily the facts. In the Texas case, Appellants trespassed on the private property of another and "sat in" while in the Ohio case the meeting took place on private property and involved no actual trespassing or crime.

"Standing" considerations produce some slippery distinctions. From these two cases, we deduce that standing to invoke the First Amendment against a statute exists in persons who gather to express threats of violence in opposition to clear public policy and indeed contrive to transmit their violent disaffection by television, while the Texas group lacks standing to invoke the First Amendment where their ultimate aim is to promote cherished national policy but their intent includes trespass.

However, the Texas group was not convicted of trespass. Trespass is not a crime in Texas and the State has never claimed that it is. Nor was the Texas group convicted of sitting in the restaurant, or refusing to leave when requested to do so, or for blocking the seats while sitting in them.

The Texas group was convicted of a meeting of three or more persons with an intent to interfere with a cafe owner in the operation of his business or to disturb him in the enjoyment thereof.

So, this case is not *Adderley v. Florida,* 285 U.S. 39, in which the Florida general trespass statute was applied. Since Texas does not make trespass a crime and since it is not charged that the Texas group met with the intent

to commit any crime, this case cannot rightly be pigeonholed as a simple trespass or conspiracy prosecution. The State of Texas has assured this Court as much at page 9 of its successful Motion to Dismiss where it says:

> "The evil which is attacked by the statute is '. . . to aid each other . . . to deprive any person of any right or to disturb him in the enjoyment thereof.' "

Loss of standing here, then, evidently rests upon the notion that anyone knows, or should know, that it amounts at least to a civil wrong to trespass or to remain in a restaurant after being directed to leave with an object of disturbing the proprietor in the enjoyment of his rights. And, further, since this much common sense is rightly chargeable to any citizen, those who meet (in groups of 3 or more) with such an intent do not have standing to interpose the First Amendment against the statute unless their subsequent conduct is also constitutionally protected. It is submitted this goes too far where the challenged statute reaches beyond force or violence, beyond defined criminal conduct, and into the ambiguous area of civil wrongs. This the Texas statute does.

The menacing overhang of a statute like this is not really different from the prior restraint you condemned in No. 6, this term, *Carroll v. Princess Ann,* decided November 19, 1968. "An order issued in the area of First Amendment rights must be couched in the narrowest terms . . ." Ibid, slip opinion, p. 6. Just so, a statute in the First Amendment area must be "precisely drawn." The rights in question are too precious to be ignored by considerations of standing. The court order struck down in *Carroll* pertained to ugly conduct indeed, but this court refused to decide if an injunction could be justified on

the facts of the case. Ibid, p. 6. For the same reasons, an overbroad statute which becomes, in effect, a prior restraint or chilling agent or First Amendment conduct should not be allowed to stand because a conviction could be justified on the facts of the case under a properly drawn statute.

It is clear that the Texas and Ohio statutes are similar in that they both prohibit the assemblage of persons formed to teach or advocate (or intend) the use of unlawful methods of crime, force or violence. The Texas statute goes further to reach all methods, even peaceful. The Ohio statute relates to the objective of political or industrial reform. The Texas statute relates to the disturbance of private rights.

No limiting construction of the Texas courts trims the reach of the Texas statute, the State's Motion to Dismiss notwithstanding. The statute applies to an intent by any means to disturb any right. A careful reading of the Texas decisions cited by both parties here will confirm this point.

The record in this case shows an exclusion of evidence offered by Appellants to show retaliation visited upon Negroes who attempted to obtain service in this restaurant, a public accommodation. As this record also shows, these defendants originally removed this case to federal court in reliance upon *Rachel v. Georgia;* 342 F.2d 336 (CA 5, 1965), alleging in their removal petition that the instant prosecutions were maintained in support of a policy of racial segregation maintained by Huntsville City and Walker County, Texas. (*Rachel* was a trespass case.)

On June 20, 1966, this Court decided *Georgia v. Rachel,* 384 U.S. 780, and *City of Greenwood v. Peacock,* 384 U.S. 808. As directed in *Peacock,* Appellants con-

sented to remand to state court and took up their federal defenses there, hopefully reading of the many ways that federal claims could be urged, including the right of appeal to this Court, 384 U.S. 828-831, as *Peacock* reminded.

Now, the "standing" problem has evidently intruded. By orthodox First Amendment doctrine, Appellants have a claim against an overbroad statute specifically regulating peaceful assembly. By *Adderley* and other standards, we should not be able to raise First Amendment claims which belong only to others. *England v. Louisiana St. Bd. of Med. Exam.*, 375 U.S. 411, cited in *Greenwood*, 384 U.S. p. 829, articulates the confusion in litigation which results.

The Texas statute expressly regulates First Amendment peaceful assemblage. Cf. *U. S. v. Petrillo*, 332 U.S. 1, 9-10. It, therefore, merits appropriate careful scrutiny as to its potential effect on associational activity. These Appellants are not guilty of such "hard core" conduct as to disqualify them from challenge of a statute as overbroad as this where their conduct was not criminal in any respect except their gathering in a group of three or more.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Attorney for Appellants

November 21, 1968

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

LICHTEN ET AL. *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 414. Decided October 28, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted and set the case for argument.